Chin Chan Leong v Public Prosecutor & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-09–87 OF 2008 AND W-09–88 OF 2008
LOW HOP BING, KN SEGARA AND RAMLY ALI JJCA
17 DECEMBER 2009

Criminal Procedure — Charge — Defective charge — Appeal against — Whether charge vague and uncertain — Charges under s 84(1) of the Securities Industry Act 1983 — Whether legal requirement of framing charges in ss 152, 153 and 154 of the Criminal Procedure Code complied with — Whether charge of abetment under s 84(1) of the Securities Industry Act 1983 read with s 122C(c) could be framed generally — Whether particulars of abetment set out in charge

Securities — Speculation — Creating misleading appearance of active trading at KLSE — Whether charge vague and uncertain — Whether prosecution to give accused further particulars — Securities Industry Act 1983 ss 84(1) & 122C(c)

The first accused faced two charges in the sessions court under s 84(1) of the Securities Industry Act 1983 ('the Act'), punishable under s 88B thereof. The first charge was that he had created a misleading appearance of active trading in Fountain View Development Bhd ('the company') shares in the Kuala Lumpur Stock Exchange ('KLSE') by indirectly being concerned in transactions of sale and purchase of the company's shares that did not involve any change in the beneficial ownership of the shares. The second charge was that he had caused to be created a misleading appearance with respect to the price of the company's shares in the KLSE. Two abetment charges were preferred against the second accused, under s 84(1) read with s 122C(c) of the Act, punishable under s 88B thereof. In the sessions court, the first accused raised a preliminary objection on the ground that the two charges against him were vague and uncertain. A preliminary objection was also raised for the second accused on the ground that the manner of the abetment alleged was not specified in the abetment charges. These objections were sustained by the learned sessions court judge who directed the prosecution to give the first accused further particulars relating to the two principal charges against the first accused and to amend the two abetment charges against the second accused. In allowing the appeals by the prosecution, the learned High Court judge directed the trial in the sessions court to proceed accordingly. These two appeals were lodged by the appellants (the first and second accused) against the decision of the learned High Court judge. The prosecution

claimed that the learned High Court judge was correct in holding that the charges were not defective, and had indeed complied with ss 152–154 of the Criminal Procedure Code ('the CPC').

Held, dismissing the appeals:

(1) Sections 152–154 of the CPC contain comprehensive provisions regulating the form of a charge, the particulars as to time, place and person to be included and the manner of committing the offence (see para 11).

(2) In relation to the first accused, the prosecution had complied with the procedural law contained in ss 152–154 of the CPC and the ingredients set out in the substantive law under s 84(1) of the Act (see para 15).

(3) Although the prosecution was at liberty to prefer a charge of abetment generally under s 122C(c) of the Act, the prosecution had specifically travelled the extra mile and set out the particulars of the principal charges against the first accused in the abetment charges preferred against the second accused. In relation to the abetment charges, the prosecution had complied with the procedural law contained in ss 152–154 of the CPC, and the substantive law enacted in s 84(1) read with s 122C(c) of the Act (see para 23).

[Bahasa Malaysia summary

Tertuduh pertama di hadapkan dengan dua tuduhan di mahkamah sesyen di bawah s 84(1) Akta Perindustrian Sekuriti 1983 ('Akta'), boleh dihukum di bawah s 88B. Tuduhan pertama adalah dia membuat tanggapan yang mengelirukan dagangan aktif saham Fountain View Development Bhd ('syarikat tersebut') dalam Bursa Saham Kuala Lumpur ('BSKL') dengan secara tak langsung terlibat dalam urus niaga jual beli saham syarikat tersebut yang tidak melibatkan sebarang pertukaran dalam pemilikan benefisial saham-saham tersebut. Tuduhan kedua ialah dia telah mengakibatkan membuat tanggapan yang mengelirukan tentang harga saham syarikat tersebut di BSKL. Dua tuduhan persubahatan dibuat terhadap tertuduh kedua, di bawah s 84(1) dibaca bersama s 122C(c) Akta, boleh dihukum di bawah s 88B. Di mahkamah sesyen, tertuduh pertama membangkitkan bantahan awal atas dasar bahawa dua tuduhan terhadapnya adalah kabur dan tidak pasti. Bantahan awal juga dibangkitkan oleh tertuduh kedua atas dasar cara persubahatan yang didakwa tidak diperincikan dalam tuduhan-tuduhan persubahatan tersebut. Bantahan-bantahan tersebut diterima oleh hakim mahkamah sesyen yang bijaksana yang mengarahkan pihak pendakwaan memberikan tertuduh pertama butiran lanjut berkaitan dua tuduhan utama terhadap tertuduh pertama dan untuk meminda kedua-dua tuduhan persubahatan terhadap tertuduh kedua. Dalam membenarkan rayuan-rayuan oleh pihak pendakwaan, hakim Mahkamah Tinggi yang bijaksana

mengarahkan perbicaraan di mahkamah sesyen diteruskan sewajarnya. Kedua-dua rayuan ini dimasukkan oleh perayu-perayu (tertuduh pertama dan kedua) terhadap keputusan hakim Mahkamah Tinggi yang bijaksana. Pihak pendakwaan mendakwa bahawa hakim Mahkamah Tinggi yang bijaksana adalah tepat dalam memutuskan bahawa tuduhan-tuduhan tersebut tidak cacat, malah mematuhi ss 152–154 Kanun Prosedur Jenayah ('KPJ').

Diputuskan, menolak rayuan-rayuan:

(1) Seksyen-seksyen 152–154 KPJ mengandungi peruntukan lengkap berkaitan bentuk tuduhan, butiran masa, tempat dan orang yang perlu dimasukkan ke dalamnya dan juga cara melakukan kesalahan tersebut (lihat perenggan 11).

(2) Berkaitan tertuduh pertama, pihak pendakwaan telah mematuhi undang-undang prosedur yang terkandung dalam ss 152–154 KPJ dan perawis-perawis yang dinyatakan dalam undang-undang substantif di bawah s 84(1) Akta (lihat perenggan 15).

(3) Walaupun pihak pendakwaan bebas untuk membuat tuduhan persubahatan secara amnya di bawah s 122C(c) Akta, pihak pendakwaan secara spesifiknya telah membuat lebih lagi dan menyatakan butiran tuduhan-tuduhan utama terhadap tertuduh pertama dalam tuduhan-tuduhan persubahatan yang dibuat terhadap tertuduh kedua. Berkaitan tuduhan-tuduhan persubahatan, pihak pendakwaan telah mematuhi undang-undang prosedur yang terkandung di dalam ss 152–154 KPJ, dan undang-undang substantif yang digubal dalam s 84(1) dibaca bersama s 122C(c) Akta (lihat perenggan 23).]

Notes

For a case on speculation, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) para 969.

For cases on defective charge, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1083–1115.

Cases referred to

Ab Malek bin Atan v PP [2002] 4 MLJ 84, HC (refd)

Datuk Haji Harun bin Haji Idris & Ors v PP [1978] 1 MLJ 240, FC (refd)

Loh Liang Gun & Anor v PP [2007] 5 MLJ 159; [2007] 4 AMR 353, CA (refd)

Pasupathy a/l Kanagasaby v PP [2005] 1 MLJ 493, CA (refd)

Legislation referred to

Criminal Procedure Code ss 152, 152(1), (2), 153, 153(1), 154, 158
Penal Code ss 107, 109, 420
Securities Industry Act 1983 (repealed by the Capital Markets and Services Act 2007) ss 84(1), 88B, 122C(c)

Rajan Navaratnam (Rajan Navaratnam) for the appellant in Criminal Appeal No W-09–87 of 2008.
Edmond Bon Tai Soon (Chooi & Co) for the appellant in Criminal Appeal No W-09–88 of 2008.
Roz Mawar Rozain (Deputy Public Prosecutor, Securities Commissions) for the prosecution in both appeals.

Low Hop Bing JCA (delivering judgment of the court):

APPEALS

[1] These two appeals were lodged by the appellants ('the first and second accused') against the decision of the learned High Court judge who had on 11 November 2008 allowed the prosecution's appeal and set aside the decision of the sessions court dated 5 June 2006.

FACTUAL BACKGROUND

[2] The first accused faces two charges in the sessions court, under s 84(1) of the Securities Industry Act 1983, punishable under s 88B thereof.

[3] These charges merit reproduction as follows:

> First Charge
>
> That you, between 18 November 2003 and 20 January 2004, at Kuala Lumpur Stock Exchange, 14th Floor, Exchange Square, Bukit Kewangan, 50250 Kuala Lumpur, created a misleading appearance of active trading in Fountain View Development Berhad (Company No. 585360–T) shares on a stock market, that is, the Kuala Lumpur Stock Exchange (now known as Bursa Malaysia Securities Berhad), by indirectly being concerned in transactions of sale and purchase of Fountain View Development Berhad shares that do not involve any change in the beneficial ownership of the said Fountain View Development Berhad shares, through the central depository securities accounts listed in the Appendix to this charge, and you have thereby committed an offence under section 84(1) of the Securities Industry Act 1983 (Act 280) punishable under section 88B of the same Act.
>
> Second Charge
>
> That you, between 18 November 2003 and 20 January 2004, at Kuala Lumpur Stock Exchange, 14th Floor, Exchange Square, Bukit Kewangan, 50250 Kuala Lumpur, caused to be created a misleading appearance with respect to the price of

Fountain View Development Berhad (Company No 585360–T) shares on a stock market, that is, the Kuala Lumpur Stock Exchange (now known as Bursa Malaysia Securities Berhad), by indirectly being concerned in transactions of sale and purchase of Fountain View Development Berhad shares that do not involve any change in the beneficial ownership of the said Fountain View Development Berhad shares which have the effect of raising the price of Fountain View Development Berhad shares, which transactions were executed through the central depository securities accounts listed in the Appendix to this charge, and you have thereby committed an offence under section 84(1) of the Securities Industry Act 1983 (Act 280) punishable under section 88B of the same Act.

[4] Two abetment charges were preferred against the second accused, under s 84(1) read with s 122C(c) of the same Act, punishable under s 88B thereof. These abetment charges are set out in extenso as follows:

First Charge

That you, between 18 November 2003 and 20 January 2004, at Avenue Securities Sdn Bhd, Ground Floor, THB Satu, Jalan Damansara Endah, Damansara Heights, 50490 Kuala Lumpur, abetted Chin Chan Leong (NRIC No. 531023–10–5669) who created a misleading appearance of active trading in Fountain View Development Berhad (Company No. 585360–T) shares on a stock market, that is, the Kuala Lumpur Stock Exchange (now known as Bursa Malaysia Securities Berhad), where Chin Chan Leong was indirectly being concerned in transactions of sale and purchase of Fountain View Development Berhad shares that do not involve any change in the beneficial ownership of the Fountain View Development Berhad shares, through the central depository securities accounts listed in the Appendix to this charge, and the said offence was committed pursuant to your abetment and you have thereby committed an offence under section 84(1) read together with section 122C(c) of the Securities Industry Act 1983 (Act 280) punishable under section 88B of the same Act.

Second Charge

That you, between 18 November 2003 and 20 January 2004, at Avenue Securities Sdn Bhd, Ground Floor, THB Satu, Jalan Damansara Endah, Damansara Heights, 50490 Kuala Lumpur, abetted Chin Chan Leong (NRIC No 531023–10–5669) who caused to be created a misleading appearance with respect to the price of Fountain View Development Berhad (Company No. 585360–T) shares on a stock market, that is, the Kuala Lumpur Stock Exchange (now known as Bursa Malaysia Securities Berhad), where Chin Chan Leong was indirectly being concerned in transactions of sale and purchase of Fountain View Development Berhad shares that do not involve any change in the beneficial ownership of the said Fountain View Development Berhad shares which have the effect of raising the price of Fountain View Development Berhad shares, which transactions were executed through the central depository securities accounts listed in the Appendix to this charge, and the said offence was committed pursuant to your abetment and you have thereby committed an offence under section 84(1) read together with section 122C(c) of the Securities Industry Act 1983 (Act 280) punishable under section 88B of the same Act.

[5] In the sessions court, the first accused raised a preliminary objection on the ground that the two charges against him were vague and uncertain. A preliminary objection was also raised for the second accused on the ground that the manner of the abetment alleged was not specified in the abetment charges.

[6] These objections were sustained by the learned sessions court judge who directed the prosecution:

(a) to give the first accused further particulars relating to the two principal charges against the first accused; and

(b) to amend the two abetment charges against the second accused.

[7] In allowing the appeals by the prosecution, the learned High Court judge directed the trial in the sessions court to proceed accordingly.

[8] Being dissatisfied, both the accused have filed these appeals.

THE CHARGES

[9] Learned defence counsel Mr Rajan Navaratnam (for the first accused) and Mr Edmond Bon Tai Soon (for the second accused) supported the above directions given by the learned sessions court judge and argued that the learned judge of the High Court has erred in setting aside these directions. They contended that the appeal herein should be allowed.

[10] Ms Roz Mawar Rozain, the learned deputy public prosecutor, responded that the learned judge of the High Court was correct in holding that the charges were not defective, and had indeed complied with ss 152–154 of the Criminal Procedure Code ('ss 152–154').

[11] Our perusal of ss 152–154 reveals that they contain comprehensive provisions regulating the form of a charge, the particulars as to time, place and person to be included therein and the manner of committing the offence.

[12] The relevant portions of ss 152–154 merit reproduction as follows:

152 Form of charge

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by the name only.

(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) ...

153 Particulars as to time, place and person

(1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) ...

154 When manner of committing offence must be stated

When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[13] The first accused is alleged to have created a misleading appearance of active trading in securities, contrary to s 84(1) which, where relevant, reads as follows:

84 False trading and market rigging transaction

(1) Subject to section 87B, no person shall create … a ... misleading appearance of active trading in any securities on a stock market in Malaysia.

[14] In our view, s 84(1) creates various distinct offences, including the two offences alleged in the charges against the first accused viz creating a misleading appearance of active trading of securities ('the first charge'); and creating misleading appearance with respect to the price of securities ('the second charge').

[15] In relation to the first accused, the prosecution's compliance with the procedural law contained in ss 152–154 and the ingredients set out in the substantive law under s 84(1) may be illustrated as follows:

First charge:

(a) Person: Chin Chan Leong (s 153(1)).

(b) Date: Between 18 November 2003 and 20 January 2004 (s 153(1) read with s 154).

(c) Offence: Created a misleading appearance of active trading in securities in Fountain View Development Bhd shares under s 84(1) (s 152(1) and (2)).

(d) Particulars of how the misleading appearance of active trading was created: Through transactions of sale and purchase of Fountain View Development Bhd ('FVDB') shares that do not involve any change in beneficial ownership (s 154).

(e) Particulars of the involvement of the accused: By indirectly being concerned in the transactions of sale and purchase of FVDB shares that do not involve any change in beneficial ownership of the said shares through the 20 central depositories securities accounts listed in the appendix to the charge (s 154).

(f) On a stock market in Malaysia: The Kuala Lumpur Stock Exchange (now known as Bursa Malaysia Securities Berhad) (s 153(1)).

Second charge:

(a) Person: Chin Chan Leong (s 153(1)).

(b) Date: Between 18 November 2003 and 20 January 2004 (s 153(1)).

(c) Offence: Caused to be created a misleading appearance with respect to the price of any such securities, viz FVDB shares (s 152).

(d) Particulars of how the misleading appearance with respect to the price was caused to be created: Through the transactions of sale and purchase of FVDB shares that do not involve any change in beneficial ownership (s 154).

(e) Particulars of the involvement of the accused: By indirectly being concerned in the transactions of sale and purchase of FVDB shares that do not involve any change in beneficial ownership of the said shares through the central depositories securities accounts listed in the appendix to the charge (s 154).

(f) On a stock market in Malaysia: The Kuala Lumpur Stock Exchange (now known as Bursa Malaysia Securities Bhd) (s 153(1)).

[16] Next, with specific reference to the second accused, s 122C(c) creates the offence of, inter alia, abetment in the following words:

Section 122C ... abetments …

A person who:

(a) …

(b) …

(c) abets … any offences under this Act, whether or not the offence is committed in consequence thereof, commits such offence and is liable to the penalty for such offence.

[17] In our view, it is open to the prosecution to prefer a charge of abetment generally: see *AIR Commentaries on the Code of Criminal Procedure* (7th Ed), Vol 2 at pp 562–563, as applied in *Ab Malek bin Atan v Public Prosecutor* [2002] 4 MLJ 84 at p 93 (HC) per Augustine Paul J (now FCJ).

[18] The proposition that the prosecution is at liberty to prefer a charge of abetment generally is also supported by weighty authorities eg *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240 at p 252 para E left (FC) per Wan Suleiman FCJ (as he then was); and *Pasupathy a/l Kanagasaby v Public Prosecutor* [2005] 1 MLJ 493 at p 506 para G (CA) per Tengku Baharudin JCA.

[19] In *Loh Liang Gun & Anor v Public Prosecutor* [2007] 5 MLJ 159; [2007] 4 AMR 353 (CA), an analogous argument was advanced for the second appellant there ie that the trial judge should have invoked s 158 of the Criminal Procedure Code to amend the charges of abetment under s 109 to charges under s 107 of the Penal Code. The prosecution refuted the defence contention as baseless and added that no amendment is necessary.

[20] In delivering the unanimous judgment of this court, I noted that the abetment charges against the second appellant were preferred under s 109 read with s 420 of the Penal Code, in order to include the punishment to be meted out for the offence of abetment which is prescribed and contained in s 109 in the following words:

109 Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation — An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

[21] I also stressed that s 107 does not provide for any punishment but instead sets out each and every circumstance in which the offence of abetment may be committed, as follows:

107 Abetment of a thing

A person abets the doing of a thing who:

(a) instigates any person to do that thing;

(b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of the conspiracy, and in order to the doing of that thing; or

(c) intentionally aids, by any act or illegal omission, the doing of that thing.

[22] In finding the defence contention there to be unsustainable, I stated as follows:

The amendment raised in the defence contention, if sustained, would have resulted in the accused not being informed of the punishment under s 109. That would have deprived the second appellant of the opportunity of knowing fully the maximum sentence provided for the offences with which he has been charged, and certainly would have run counter to the fundamental rules of natural justice.

Hence, the abetment charges under s 109 are flawless and proper. They require no amendment at all.

[23] Reverting to the mainstream of the instant appeal, although the prosecution is at liberty to prefer a charge of abetment generally under s 122C(c), the prosecution herein has specifically travelled the extra mile and set out the particulars of the principal charges against the first accused in the abetment charges preferred against the second accused. We entertained no doubt that, in relation to the abetment charges, the prosecution has complied with the procedural law contained in ss 152–154, and the substantive law enacted in s 84(1) read with s 122C(c).

CONCLUSION

[24] The foregoing grounds demonstrated that these two appeals were devoid of merits. They were dismissed. We affirmed the direction of the High

Court that the trial in the sessions court be proceeded forthwith, as they were registered some five years ago ie in the year 2005.

Appeals dismissed.

Reported by Kanesh Sundrum